SUPREME COURT, U.S.
FILED
MAR - 7 2016
OFFICE OF THE CLERK

No. 15-474

IN THE

Supreme Court of the United States

ROBERT F MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF FORMER FEDERAL OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

WILLIAM J. KILBERG P.C.
THOMAS G. HUNGAR
HELGI C. WALKER
DAVID DEBOLD
Counsel of Record
RUSSELL B. BALIKIAN
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE DECISION BELOW ENDORSED AN ERRONEOUS INTERPRETATION OF "OFFICIAL ACT" THAT WOULD SUBJECT INNOCENT, ROUTINE CONDUCT BY PUBLIC OFFICIALS TO CRIMINAL PROSECUTION. 7

A. The Court Of Appeals' Interpretation Is Legally Erroneous. 7

B. The Court Of Appeals' Sweeping Interpretation Would Have Dangerous Consequences In Numerous Contexts. 10

1. Campaign Contributions 10

2. Travel Expenses 14

3. Minor Gifts 15

C. The Overbreadth Of The Jury Instructions Endorsed Below Was Magnified By Inclusion Of Acts That The Official Would Have Done Anyway. 16

II. THE INTERPRETATION ADOPTED BELOW WOULD CHILL FEDERAL OFFICIALS IN THE EFFECTIVE PERFORMANCE OF THEIR DUTIES. 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Citizens United v. FEC,
558 U.S. 310 (2010) 8, 13, 18

Clark v. Martinez,
543 U.S. 371 (2005) 14

Evans v. United States,
504 U.S. 255 (1992) 12

McConnell v. FEC,
540 U.S. 93 (2003) 18

McCormick v. United States,
500 U.S. 257 (1991) 5, 7, 10, 11, 12, 14

McCutcheon v. FEC,
134 S. Ct. 1434 (2014) 5, 9

McNally v. United States,
483 U.S. 350 (1987) 8

United States v. Birdsall,
233 U.S. 223 (1914) 3

United States v. Hairston,
46 F.3d 361 (4th Cir. 1995) 13

United States v. Rabbitt,
583 F.2d 1014 (8th Cir. 1978) 8, 9

United States v. Ring,
706 F.3d 460 (D.C. Cir. 2013) 8, 18

United States v. Siegelman,
640 F.3d 1159 (11th Cir. 2011) 13

United States v. Sun-Diamond Growers of Cal.,
526 U.S. 398 (1999) 4, 5, 9, 15, 16, 21

United States v. Urciuoli,
513 F.3d 290 (1st Cir. 2008) 4

Valdes v. United States,
475 F.3d 1319 (D.C. Cir. 2007) 4

Williams-Yulee v. Fla. Bar,
135 S. Ct. 1656 (2015) 13

STATUTES

18 U.S.C. § 201 ..... 4, 7, 9, 15, 16

REGULATIONS

5 C.F.R. § 2635.202 16

5 C.F.R. § 2635.204 16

OTHER AUTHORITIES

Chris Young et al., *Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminars*, The Center for Public Integrity (May 27, 2014) 14, 20

Fredreka Schouten, *Lawmakers Accept Millions in Free Travel*, USA Today (Feb. 27, 2014) 14, 19

Jonathan Weisman, *G.O.P. Error Reveals Donors and the Price of Access*, N.Y. Times (Sept. 24, 2014) 12

Julie Pace, *What $40,000 Gets You in Presidential Fundraising*, MPR News (June 7, 2012) 11, 20

Leslie Larson, *What You Get if You Donate $1 Million To Back Presidential Candidate Scott Walker*, Business Insider (May 20, 2015) 11

Michael Pope, *Virginia Lawmakers Cautious About Ethics—and Eggs—After McDonnell Conviction*, WAMU 88.5 (Dec. 15, 2014) 21

Tyler Kingkade, *Here Are Some of the Big Names Giving Commencement Addresses in 2015*, Huffington Post (Apr. 28, 2015) 14, 19

INTEREST OF *AMICI CURIAE*[1]

This brief is submitted by the following:

- John Ashcroft, Attorney General (2001–2005), U.S. Senator (1995–2001)
- Gregory B. Craig, Counsel to the President (2009–2010)
- Lanny J. Davis, Special White House Counsel (1996–1998)
- Thomas M. Davis, U.S. Representative (1995–2008)
- Fred F. Fielding, Counsel to the President (2007–2009 & 1981–1986)
- Mark Filip, Attorney General (Acting) (2009), Deputy Attorney General (2008–2009)
- C. Boyden Gray, Counsel to the President (1989–1993)
- Harry Litman, U.S. Attorney (1998–2001), Deputy Assistant Attorney General (1993–1998)
- James P. Moran, U.S. Representative (1991–2015)

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Both parties have lodged letters granting blanket consent to the filing of *amicus curiae* briefs.

- Michael B. Mukasey, Attorney General (2007–2009)
- Theodore B. Olson, Solicitor General (2001–2004), Assistant Attorney General, Office of Legal Counsel (1981–1984)
- John M. Quinn, Counsel to the President (1995–1997)
- Larry Dean Thompson, Deputy Attorney General (2001–2003)

We are former federal officials with first-hand knowledge of the types of interactions that routinely occur between government officials and members of the public. Our collective experience includes serving as elected officials as well as advising Presidents and other federal officials on the steps needed to ensure that those interactions comply with ethics guidelines and a variety of federal laws, including criminal statutes. Among the signatories to this brief are Counsels to the President who have served every President of the United States since Ronald Reagan.

As former officials, we are deeply concerned that the decision below will have far-reaching and detrimental effects on the proper functioning of government. The court of appeals took a core feature of representative democracy—access to public officials—and turned it into a federal felony if a jury can infer a link between that access and a thing of value. The court greatly expanded criminal liability by ruling that an "official act"—which serves as the "quo" in an unlawful quid pro quo—is *any* action that, "by settled practice," public officials "customarily per-

for[m]" on any question or matter. Pet. App. 275a. That action need not resolve or even influence the outcome of any question or matter, the court concluded; rather, an action qualifies even if it is just "one in a series of steps to achieve an end." *Id.* This broad definition allowed the court to affirm petitioner's corruption conviction where the only alleged "actions" were inviting a supporter (the alleged bribe payor) and guests of the supporter's choosing to a reception at the governor's official residence; asking another official to send an aide to a meeting with the supporter; asking a government lawyer (the official's counsel) to meet with the official to discuss a topic involving the supporter; asking questions of the supporter during a question-and-answer session at a privately funded luncheon; and suggesting a meeting between the official's subordinates and the supporter, *see* Pet. Br. 5-8.

We have no personal interest in the outcome of this particular prosecution. Nor is it our role to pass judgment on whether the conduct prosecuted here was prudent. But that is likewise not the purpose of federal public corruption law. That law should not be broadened to subject government officials to the threat of prosecution for engaging in innocent conduct that occurs on a routine basis.

The Fourth Circuit's interpretation of "official act," however, would do just that—even though numerous courts, following this Court's direction, have understood official action to be the exercise of governmental power, and not merely a grant of access to those in official positions. *See, e.g., United States v. Birdsall*, 233 U.S. 223, 229-31 (1914) (special officers carried out official acts by advising the Commission-

er of Indian Affairs to recommend judicial clemency for particular persons where regulations required special officers to advise the Commissioner on the effects of clemency grants in particular cases); *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) (honest services statute applies "not only to formal official action like votes but also the informal exercise of influence on bills by a legislator"); *Valdes v. United States*, 475 F.3d 1319, 1325 (D.C. Cir. 2007) (en banc) (official acts include "decisions that the government actually makes," such as "a congressman's use of his office to secure Navy contracts for a ship repair firm"); *see also United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999) (rejecting a reading of the federal gratuity and bribery statute that would expand the meaning of "official acts" to include the President's "receiving sports teams at the White House" or the Secretary of Education's "visit to [a high] school"); Pet. Br. 27-29 (collecting cases).

The Court should reject this unwarranted expansion of the law so that officials who faithfully carry out their duties need not fear prosecution for granting the access that is essential to a representative democracy.

SUMMARY OF ARGUMENT

I. The expansive definition of "official act" adopted below would criminalize legitimate, commonplace actions by public officials "on" any particular issue or question, even where the conduct falls well short of governmental action. 18 U.S.C. § 201(a)(3); *see* Pet. Br. 40-43. The court of appeals extended that statutory term, for the first time, to

such routine acts as inviting a constituent to a cocktail reception attended by persons in the constituent's field of interest, or suggesting that a staffer simply meet with the constituent. This interpretation provides officials and their advisors with no reliable means of distinguishing between legitimate grants of political access or permissible expressions of gratitude, on the one hand, and the selling of government power, on the other. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

A careful definition of the term "official action"—the "quo" in an unlawful quid pro quo—is essential because of the many legitimate things of value that can serve as the "quid." For example, this Court has held that officials can be prosecuted for bribery where the thing of value is a campaign contribution. *See McCormick v. United States*, 500 U.S. 257, 273 (1991). Officials also are frequently reimbursed by private parties for travel expenses, and they often receive gifts of modest value. *See, e.g., United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999). The federal bribery laws do not distinguish among these various things of value. Each would fully satisfy one half of a quid pro quo allegation. Thus, if the decision below is affirmed, nothing but prosecutorial discretion would stand in the way of a felony indictment whenever receipt of anything of value can be tied to mere access to officials who are willing to listen, but do not agree to exercise (or influence the exercise of) government power. Making matters worse, especially in cases where the quid has only minor value (such as a free meal or reimbursement for travel), it is no defense under the Fourth Circuit's decision that the official would have provid-

ed access even had the official received nothing in return. This Court should repudiate those instructions and clarify that an "official action" for purposes of federal public corruption laws must be tied to an exercise of actual governmental power.

II. If allowed to stand, the court of appeals' breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties. The decision below subjects to potential prosecution numerous routine behaviors that have long been essential to the day-to-day functioning of our representative government. To effectively serve, public officials must interact with the public, seeking to understand their needs and learn about their concerns. Elected officials, in particular, are *expected* to advocate, publicize, and implement the goals of the people who elected them. That is, after all, an essential part of an official's job.

If the mere grant of access to a public official or one of her subordinates qualified as an official act, public officials would need to seek out legal opinions each time they engage in a wide array of heretofore innocent and indeed publicly beneficial activities. For example, federal officials would need to dramatically alter their approaches to "meet and greets" with constituents or speeches delivered at conferences. They would need to consider whether it is worth the risk of prosecution to interact with any person or group that has ever given them anything of value, including otherwise lawful campaign contributions or gifts. That risk would arise any time officials or their subordinates listen to the views of persons who

hope that the discussion will be the first step toward "achiev[ing] an end." Pet. App. 275a. That is, after all, a common reason people seek access to public officials.

The court of appeals' interpretation of "official act" could thus cripple the ability of elected officials to fulfill their role in our representative democracy by understanding and serving the needs of their constituents. Those harmful consequences can be avoided by holding that official acts are the exercise of governmental power, either directly or by exerting influence or pressure on another official to exercise governmental power.

ARGUMENT

I. THE DECISION BELOW ENDORSED AN ERRONEOUS INTERPRETATION OF "OFFICIAL ACT" THAT WOULD SUBJECT INNOCENT, ROUTINE CONDUCT BY PUBLIC OFFICIALS TO CRIMINAL PROSECUTION.

A. The Court Of Appeals' Interpretation Is Legally Erroneous.

Federal bribery law forbids certain quid pro quo exchanges. *See McCormick v. United States*, 500 U.S. 257, 273 (1991). Specifically, a public official may not agree to receive a thing of value in return for performing an "official act." The federal bribery statute defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

Courts have consistently understood this definition to mean what it says: an exercise of actual governmental power, either directly (for example, voting on legislation or awarding a contract) or indirectly (such as pressuring another official to vote a certain way or grant a contract to a particular party). *See* Pet. Br. 27-29.

The court below drastically departed from this line of authority, ruling that an "official act" can be virtually any of the many routine activities in the day-to-day life of a public servant: any actions that "by settled practice" a person in that position "customarily performs, even if those actions are not described in any law, rule, or job description." Pet. App. 275a. In approving this novel "customarily performs" standard, the court failed to exclude a wide variety of commonplace, lawful behavior, such as: "[i]ngratiation and access," which are "not corruption," *Citizens United v. FEC*, 558 U.S. 310, 360 (2010); "purely informational inquiries," *United States v. Ring*, 706 F.3d 460, 469 (D.C. Cir. 2013); and helping a donor "gain a friendly ear," *United States v. Rabbitt*, 583 F.2d 1014, 1028 (8th Cir. 1978), *abrogated in part on other grounds by McNally v. United States*, 483 U.S. 350 (1987). Furthermore, the court endorsed the novel view that "official action" encompasses conduct several steps removed from what has long been thought to be an official act: The jury was told that the definition extends to "actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end." Pet. App. 275a.

For the reasons ably explained by petitioner, the court of appeals committed serious error in this interpretation of "official act." Pet. Br. 21-43. We emphasize that when the court of appeals endorsed instructions that allowed the jury to convict for "customary" conduct divorced from the exercise of actual governmental power, it committed the very mistake that this Court warned against seventeen years ago in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999). Certain common activities by public officials may well be "official acts in some sense," but they are *not* illegal "quos" under federal law. *Id.* at 407 (quotation marks omitted); *see also supra* at 3-4. In fact, as the Eighth Circuit has correctly held, a grant of access is not transformed into an official act just because the access *could* lead to an official act at some point in the future. *See, e.g.*, *Rabbitt*, 583 F.2d at 1028 (finding that mere introduction to a state official who might be able to award an architectural contract to the purported briber was insufficient to constitute "official action," without actual influence on that government decision).

Sweeping such commonplace behavior into the definition of an official act under Section 201(a)(3) is not only contrary to precedent, it runs headlong into the First Amendment. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion) ("[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."); *id.* at 1472 (Breyer, J., dissenting) (distinguishing "special access and influence" from "a *quid pro quo* legislative favor"). Because the court of appeals' interpretation of "official act" is le-

gally erroneous, the judgment below should be reversed. *See* Pet. Br. 21-43.

B. The Court Of Appeals' Sweeping Interpretation Would Have Dangerous Consequences In Numerous Contexts.

The consequences of the court of appeals' interpretation of "official act" extend far beyond the facts of this case. The legal meaning of an "official act" in a federal bribery prosecution is the same regardless of the nature, value, or amount of the particular "quid" at issue. Thus, if this Court endorsed the Fourth Circuit's construction of "official act," the decision would have dangerous ramifications in a wide variety of common situations. For example, the "quid" of otherwise permissible campaign contributions, travel reimbursement, and small token gifts—when married with the court of appeals' expansive test for the "quo" of "official action"—would be fair game for a federal criminal prosecution.

1. Campaign Contributions

Campaign contributions, no less than other payments, are things of value that the law prohibits officials from accepting in exchange for taking official action. *See, e.g.*, *McCormick*, 500 U.S. at 273 ("The receipt of [political] contributions is also vulnerable under the [Hobbs] Act if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."). Yet politicians of all stripes frequently offer their supporters access—private meals with the politician or her staff, tickets to campaign events that will be accessible only to contributors, or meetings with policy advisors—in return for specified contri-

butions in lawful amounts. During the 2012 presidential campaign, for example, a $10,000 contribution secured a photo opportunity with either Governor Romney or President Obama.[2] More recently, 2016 presidential candidates from both major parties promised special access in the form of "summit[s]" for donors who "gave $25,000" or "raise[d] $2,700 from 10 people."[3]

If the decision below stands, then such commonplace exchanges would be federal crimes. *See* Pet. Br. 41-42. Criminalizing exchanges of campaign contributions for access would jeopardize not only "conduct that has long been thought to be well within the law but also conduct" that this Court has called "unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *McCormick*, 500 U.S. at 272. Indeed, the jury instructions approved here were so broad that even inviting a campaign donor and some of the donor's recommended guests to an evening reception at which no official business is discussed qualifies as an official act—one in a series of steps to achieve the do-

---

[2] Julie Pace, *What $40,000 Gets You in Presidential Fundraising*, MPR News (June 7, 2012), http://goo.gl/tRZHAz ("Write a big check, and you'll get you a picture with the president and a chance to swap political strategy with him—all while enjoying a gourmet meal at the lavish home of a Hollywood celebrity or Wall Street tycoon. Mitt Romney is offering donors perks that include everything from a private dinner with him to seats at the fall debates.").

[3] Leslie Larson, *What You Get if You Donate $1 Million To Back Presidential Candidate Scott Walker*, Business Insider (May 20, 2015), http://goo.gl/PwKVTV.

nor's end—because that is something elected officials "customarily" do. As petitioner notes, this conduct fits comfortably within the Fourth Circuit's capacious definition of official action. The jury could have convicted for that conduct alone, Pet. Br. 52, yet the court of appeals did not explain how it could possibly be an "official act" under any plausible construction of the statute.

It is cold comfort that the government must show an "explicit" quid pro quo agreement to secure a bribery conviction in campaign contribution cases. *E.g.*, *McCormick*, 500 U.S. at 273. After all, officials often *do* make explicit that a campaign contribution will secure access to an official and the official's staff. *See*, *e.g.*, Jonathan Weisman, *G.O.P Error Reveals Donors and the Price of Access*, N.Y. Times (Sept. 24, 2014), http://goo.gl/wFZzEo (donors would receive private meals "with the Republican governors and members of their staff," as well as tickets to seminars and discussion groups for "a $50,000 annual contribution or a one-time donation of $100,000" or, for twice those sums, dinner and a meeting at a Washington hotel).

Even without a campaign mailing as Exhibit A on the explicit-agreement element, the government need not produce a witness who heard an official and a contributor agree to an exchange. Jurors instead are permitted to infer an "explicit" agreement from circumstantial evidence. *See*, *e.g.*, *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods.

The inducement from the official is criminal if it is express or if it is implied from his words and actions."); *United States v. Siegelman*, 640 F.3d 1159, 1171-72 (11th Cir. 2011) (per curiam); *United States v. Hairston*, 46 F.3d 361, 365 (4tn Cir. 1995).

Suppose that a donor makes a sizeable contribution to a President's re-election campaign a week before the donor's spouse visits the White House for a meeting with the President to discuss a policy matter. A jury may well infer that the contribution's timing was no coincidence. (And, as this case shows, the donor might very well be persuaded to testify that access was the reason behind the donor's contribution. Pet. Br. 9-11.) Thus, if a meeting, by itself, can be an official act, a prosecutor could seek an indictment for bribery no matter how routine, disclosed, or ethical the behavior. Mere "access" on a matter of interest to the donor would be a federal crime just because the official received something of value in return.

The lower court's broad definition of "official act" threatens the legitimate, pervasive, and constitutionally protected role of campaign contributions in federal elections. This Court has made clear, in recognizing that valuable role, that mere "[i]ngratiation and access" "are not corruption." *Citizens United*, 558 U.S. at 361; *see also Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1674 (2015) (Ginsburg, J., concurring in part and concurring in the judgment) (noting that "[f]avoritism" may be "inevitable in the political arena," where politicians are "expected to be responsive to the concerns of constituents" (alteration and quotation marks omitted)). The court below, however, dismissed this admonition as a mere talisman, as

if "campaign-finance case[s]" are somehow immune from prosecution under either "the honest-services statute [or] the Hobbs Act." Pet. App. 64a. Because *McCormick* makes clear that they are not, the harm to these First Amendment interests cannot be so easily dismissed. At a minimum, the canon of constitutional avoidance counsels a narrower interpretation of federal bribery law. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (where one of two statutory constructions "would raise a multitude of constitutional problems, the other should prevail"). This Court should reject a reading that criminalizes conduct never before treated as public corruption, including political access that the Constitution affirmatively protects.

2. Travel Expenses

Officials also often receive items "of value" in the form of reimbursement for travel expenses, meals, or outings. Consistent with applicable federal regulations, federal officials often travel at private expense—thus sparing taxpayer dollars—to deliver speeches, perform fact-finding missions, or attend conferences.[4]

---

[4] *See* Tyler Kingkade, *Here Are Some of the Big Names Giving Commencement Addresses in 2015*, Huffington Post (Apr. 28, 2015), http://goo.gl/tA8z3X (listing, among others, the Vice-President of the United States and a member of Congress as commencement speakers at private institutions); Fredreka Schouten, *Lawmakers Accept Millions in Free Travel*, USA Today (Feb. 27, 2014), http://goo.gl/3UzBZa ("Members of Congress took more than $3.7 million worth of free trips last year—the highest price tag for privately funded travel in a decade."); Chris Young et al., *Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminars*, The Center for Public Integrity

Yet under the court of appeals' decision, an official who agrees to give a speech or participate in a discussion on matters within the scope of his or her duties would be guilty of a felony if the jury concludes that the official accepted the reimbursement of travel expenses in return for "being influenced in" her decision to make the trip and deliver the address or participate in the discussion. 18 U.S.C. § 201(b)(2)(A). The government could also allege that any discussions in which the official participated during the trip are official acts in exchange for such payments if the topics included matters of interest to those who paid the expenses. These bizarre results run directly counter to this Court's admonition that it is not a federal crime for "a group of farmers" to provide "a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy." *Sun-Diamond*, 526 U.S. at 407. Under the decision below, receiving travel reimbursement or a free meal would be a crime if, for example, the farmers expressed concerns to the Secretary about a matter of USDA policy that affected them. Pet. App. 54a. The way "to eliminate [such] absurdities," this Court explained, is "through the [proper] definition" of "official act." 526 U.S. at 408 (emphasis omitted).

3. Minor Gifts

Even gifts of *de minimis* value could be criminalized under the Fourth Circuit's holding. The statu-

---

(May 27, 2014), http://goo.gl/ybfNQb (reporting that 185 federal district and appellate judges attended 109 privately funded seminars over a recent four-year period).

tory prohibition on bribery is broader than the related ethics regulations because it contains no exception for minor gifts. *Compare* 18 U.S.C. § 201(b), *with* 5 C.F.R. § 2635.204; *see Sun-Diamond*, 526 U.S. at 411-12. Thus, returning to the example in *Sun-Diamond* of an Agriculture Secretary who agrees to discuss ethanol subsidies with a local group of farmers, the gift to the Secretary of a personalized plaque commemorating the event could be a federal crime under the Fourth Circuit's approach if the jury concluded that the gift (likely accompanied by a bit of favorable local publicity) motivated the Secretary to meet with the group.[5]

C. The Overbreadth Of The Jury Instructions Endorsed Below Was Magnified By Inclusion Of Acts That The Official Would Have Done Anyway.

The definition of "official act" that the Fourth Circuit affirmed did more than criminalize routine conduct in the everyday life of a public official. It also foreclosed a defense that the official would have

---

[5] The ethics rules governing executive branch employees provide that gifts accepted consistent with those rules "shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. § 201(c)(1)(B)." 5 C.F.R. § 2635.202(b). They do not, however, purport to create any safe harbor with respect to bribery, nor could they. *See Sun-Diamond*, 526 U.S. at 411 ("We are unaware of any law empowering [the Office of Governmental Ethics] to decriminalize acts prohibited by Title 18 of the United States Code."). And even as to gratuities, the safe harbor contains several exclusions, subjecting federal officials to potential criminal liability for accepting any gift "in return for being influenced in the performance of an official act" or "in violation of any statute." 5 C.F.R. § 2635.202(c)(1), (4).

engaged in the activity even if he had not received the thing of value:

> [I]t is not a defense to claim that a public official would have lawfully performed the official action in question anyway, regardless of the bribe. It is also not a defense that the official action was actually lawful, desirable, or even beneficial to the public.

Pet. App. 274a-275a.

In other words, a jury would be instructed to convict even if the official would have traveled to give a speech without a promise of reimbursement for expenses, or even if the campaigning official would have listened to similar concerns voiced by a constituent who did not make a contribution to the re-election effort. Nor would it be a defense—or even relevant, for that matter—that the conduct defined as an official act was lawful, ethical, and beneficial to the public.

This part of the jury instruction further broadened the scope of criminal liability endorsed by the Fourth Circuit and magnified the impact of the legal errors in this case. Taken as a whole, the decision below would empower prosecutors nationwide to indict federal officials for routine beneficial conduct that they would have engaged in as a matter of normal course.

II. THE INTERPRETATION ADOPTED BELOW WOULD CHILL FEDERAL OFFICIALS IN THE EFFECTIVE PERFORMANCE OF THEIR DUTIES.

Federal officials have good reason to be apprehensive about the Fourth Circuit's unprecedented

broadening of the criminal bribery laws: It casts a cloud over activities that are fundamental to the operation of a representative democracy.

It is the responsibility of federal legislative and executive branch officials to understand the views of their constituents and the general public so as to act in their best interests. The people, in turn, help elect those individuals whom they expect will act consistently with those interests. "'It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.'" *Citizens United*, 558 U.S. at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.)). At bottom, "'[d]emocracy is premised on responsiveness.'" *Id.* (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)); *cf. Ring*, 706 F.3d at 463 ("Lobbyists serve as a line of communication between citizens and their representatives, safeguard minority interests, and help ensure that elected officials have the information necessary to evaluate proposed legislation."). Simply put, "'[f]avoritism and influence are not avoidable in representative politics.'" *Citizens United*, 558 U.S. at 359 (omission in original) (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)).

If federal officials are to perform their duties effectively, they must have access to the people. To that end, many federal officials customarily take the opportunity to interact with the public, including those who have supported them, in numerous beneficial, ethical, and fully disclosed ways. The fact that many persons contribute money with a particular

policy objective in mind has never before been thought to transform these commonplace interactions into official actions "on" a particular "question" or "matter." Yet the decision below permits a public-corruption conviction for any "ac[t] that a public official customarily performs," even if the act can only be described as "one in a series of steps to exercise influence" *or* "achieve an end," and even if the official has no "actual or final authority over the end result." Pet. App. 275a. The government need only prove that the alleged bribe payor "reasonably believes" that the official has "influence, power or authority over a means to the end sought by the bribe payor." *Id.* This could subject the following routine conduct to grand jury investigation and potential felony conviction if a federal prosecutor is so inclined:

- Members of Congress are frequently invited to travel on privately funded fact-finding missions, allowing them to visit businesses, listen to constituents, and learn from local experts.[6]
- Cabinet members commonly deliver commencement addresses at private colleges and universities—which award them honorary degrees—thereby giving the graduating students the opportunity to learn from and be inspired by these federal officials.[7]

---

[6] *See* Schouten, *supra* note 4.

[7] *See* Kingkade, *supra* note 4. It would come as no surprise if these trips included opportunities for cabinet members to speak informally with school officials or school donors about governmental matters of interest to the school or the donors themselves.

- The President and the officials who serve him regularly invite campaign contributors to events at the White House, such as state dinners or swearing-in ceremonies. More generally, contributors often receive, as President Clinton once put it, a "respectful hearing if they have some concern about the issues."[8]
- Federal judges may receive free transportation, lodging, and meals for attending conferences and giving lectures that foster a healthy and informed relationship between, for example, bench and bar.[9]

The court of appeals' decision would cast a shadow of illegality over legitimate, pro-democratic activities such as these. Public officials would be forced constantly to question whether the donor or host subjectively believes that he or she is buying the first step to a potentially favorable outcome.

The court of appeals' decision thus impermissibly shifts to prosecutors the critical task of deciding which of these commonplace interactions will result in prosecution and which will not. Prosecutors in the future may be faced with the temptation to yield to pressure or make a name for themselves by pursuing charges against particular public officials in high-profile matters. Armed with the Fourth Circuit's interpretation, they would need only to select a "quid" from among the official's lawful campaign contributions or other legitimate receipts, identify an action of the type customarily performed by public officials

---

8 Pace, *supra* note 2.

9 *See* Young et al., *supra* note 4.

as the ostensible "quo," and pursue indictment and possible conviction.

Rather than risk prosecution, many federal officials will be tempted simply to seal themselves off from interactions with any person or group who has given them anything of value. Federal officials will face the same type of practical problem that one Virginia lawmaker pithily described after the jury in this case convicted: "Technically speaking, I cannot go to a Rotary Club breakfast and eat $7 worth of eggs if somebody asks me to set up a meeting with the DMV."[10] For those who decide to run the risk, informal and everyday interactions may need to be cleared in advance through a fact-intensive investigation and analysis by the lawyers who advise those officials. Individuals who value their reputation for integrity—not to mention their freedom—would need to think long and hard before even entering public service. Ultimately, public service in our representative democracy would be diminished.

The court of appeals' sweeping approach also threatens to create complications with the "intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials," *Sun-Diamond*, 526 U.S. at 409, by rendering certain actions *criminal* despite regulations that have long deemed them entirely *ethical*. As a result, lawyers who advise federal officials on such matters will be hard pressed to suggest with certainty any safe har-

---

[10] Michael Pope, *Virginia Lawmakers Cautious About Ethics—and Eggs—After McDonnell Conviction*, WAMU 88.5 (Dec. 15, 2014), http://goo.gl/0ezv7y.

bor from potential federal indictment when it comes to an official's interactions with donors or other members of the public.

This Court should reject the court of appeals' overbroad definition of "official act" and preserve the ability of public officials to represent and serve the citizens of this country by interacting appropriately with them without fear of criminal liability.

CONCLUSION

An interpretation of "official act" tied to the actual exercise of governmental power is necessary to preserve the ability of public officials to represent and serve the citizens of this country by allowing them access to information of concern to the public without running the risk of criminal liability. This Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted.

WILLIAM J. KILBERG P.C.
THOMAS G. HUNGAR
HELGI C. WALKER
DAVID DEBOLD
Counsel of Record
RUSSELL B. BALIKIAN
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

Counsel for Amici Curiae

March 7, 2016